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10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13

14 In re ATM FEE ANTITRUST
15 LITIGATION

Master File No. C04-2676 VRW

16 **CLASS ACTION**

17
18 This Document Relates To:
19 ALL ACTIONS

PLAINTIFFS' SUPPLEMENTAL
SUBMISSION IN OPPOSITION TO MOTION
FOR SUMMARY JUDGMENT

20 Date: August 25, 2005
(continued by order of Court; no date set)
21 Time: 2:00 p.m.
Courtroom: 6
22 The Honorable Vaughn Walker

23
24 Defendants' responses to Plaintiffs' Requests for Admission by themselves
25 provide a sufficient basis to deny Defendants' Motion for Partial Summary Judgment. Defendants
26 based that Motion on a single factual predicate: On February 1, 2001, the Star network ceased to
27 be a joint venture and, as a result, the network's Interchange Fee came under the unilateral control
28 of a single entity, Concord EFS, Inc. ("Concord"). Concord summarized its argument at the

1 outset of its moving papers, in which the other Defendants joined:

2 As grounds for its motion, Concord asserts that plaintiffs on the
 3 undisputed facts do not have a horizontal price-fixing claim for the
 4 time period February 1, 2001 to the present as a matter of law.
5 Since February 1, 2001, the Star network has not been operated
6 as a joint venture; rather, it has been owned and operated by a
 single entity, Concord. As a result, there has been no arrangement
 – let alone a horizontal agreement – regarding the setting of the
 ATM interchange fee. There has been only independent, unilateral
 conduct that is not proscribed by Section 1 of the Sherman Act.

7 Defendant Concord EFS, Inc.’s Notice of Motion and Motion for Partial Summary Judgment;
 8 Memorandum of Points and Authorities (“Memorandum”) at p. 1, ll. 8-13 (emphasis added); see
 9 also id. at p. 10, ll. 6-7 (“Star is no longer a joint venture of banks, as it was prior to February 1,
 10 2001.”)

11 The day after Concord filed the Memorandum, Plaintiffs served Requests for
 12 Admission to confirm the basis of Defendants’ motion. Declaration of Joseph R. Saveri Pursuant
 13 to Federal Rule of Civil Procedure 56(f) in Opposition to Motion of Defendant Concord EFS
 14 Partial Summary Judgment (“Saveri Declaration”) at p. 10, ¶ 24; see also Saveri Declaration,
 15 Exh. 45. Plaintiffs asked each Defendant to admit that the following statement on page 10 of the
 16 Memorandum is true:

17 **REQUEST FOR ADMISSION NO. 1:**

18 Since February 1, 2001, the Star Network has not been a joint venture.
 19 Supplemental Saveri Declaration, Exhibit A, Plaintiffs’ First Set of Request for Admissions to
 20 Defendant First Data Corporation, Request for Admission No. 1.

21 On August 24, 2005, Defendants served responses in which they refused to admit
 22 the very fact on which they had predicated their argument. For example, the Response of
 23 Concord and First Data Corporation (collectively “First Data”) states:

24 **Objection:** First Data objects to this request on the ground that the
 25 term “joint venture,” as used in this request, is vague and
 ambiguous. First Data also objects on the ground that this request
 26 calls for a legal conclusion.¹

27 ¹ Defendants’ objections lack any merit. As to vagueness, Plaintiffs instructed Defendants to use
 28 the terms as used by Defendants in their own moving papers. Regarding the distinction between
 fact and law, Concord itself, in its moving papers, characterized as an “undisputed fact” the
 assertion that “[s]ince February 1, 2001, the Star network has not been operated as a joint

1 **Response:** Subject to and without waiving any objections, First
 2 Data admits that on February 1, 2001, the Star network was
 3 acquired by Concord EFS, Inc. (which was later acquired by First
 4 Data). First Data further admits that since February 1, 2001, the
 banks that formerly owned the Star network, including the
 defendants in this case, have had no ownership interest in the Star
 network.

5 Defendant First Data Corporations' Responses and Objections to Plaintiffs' First Set of Request
 6 for Admissions. Supplemental Declaration of Joseph R. Saveri in Opposition to Motion of
 7 Defendant Concord EFS for Partial Summary Judgment, Exh. A. The other Defendants'
 8 responses are essentially the same. *Id.*, Exhs. B, C, D, E, F, G and H. Each Defendant has
 9 refused to admit that, since February 1, 2001, the Star Network has not been a joint venture. *Id.*,
 10 Exhs. A, B, C, D, E, F, G, and H.

11 Defendants' violations of the rules of discovery aside, their refusal to admit the
 12 very fact upon which they predicated their argument is fatal to their motion. In particular, it is
 13 fatal to their effort to establish that there are no disputed facts relevant to summary judgment.
 14 Even if the Court were to accept Concord's legal argument (which Plaintiffs contest),
 15 Defendants' equivocal responses to the Requests for Admission create a genuine issue of material
 16 fact as to whether the Star network remained the subject of agreement or concerted action after
 17 February 1, 2001. Because Defendants refused to admit that the Star network ceased to be a joint
 18 venture as of February 1, 2001, they have failed to carry their initial burden on summary

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27 venture." Memorandum, p. 1, ll. 8-10. Further, Rule 36 explicitly permits Requests for
 28 Admission that seek the admission not only of facts, and of opinions of fact, but also of "the
 application of law to fact." Fed. R. Civ. P. 36(a).

1 judgment, and their motion should be denied. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157-
2 61 (1970); Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc., 210 F.3d 1099, 1103-07
3 (9th Cir. 2000).

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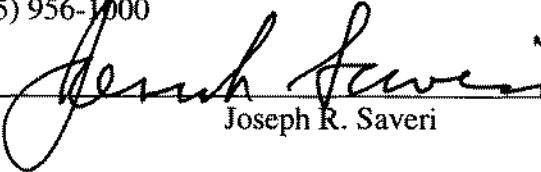
5 Dated: September 12, 2005

Respectfully submitted,

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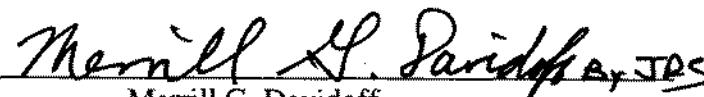
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